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IN THE

Supreme Court of the United States

No. .....

SOUTHGATE NELSON CORPORATION,
Petitioner,

vs.

ELIZABETH J. QUINN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Southgate Nelson Corporation, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit (R. 116) entered on the 18th day of July, 1941, affirming the judgment of the District Court for the Southern District of New York (R. 102-103).

Petitioner respectfully shows as follows:

Jurisdiction.

The order for mandate below was entered on July 18th, 1941 (R. 116).

The jurisdiction of this Court is provided by Title 28 U. S. Code, Section 347(a).

Opinions Below.

The opinion of District Judge Moscowitz (R. 93) is reported in 36 Fed. Supp. 873 and that of the Circuit Court of Appeals (R. 112) in 121 Fed. (2d) 190.

Question Presented.

This case involves the question of whether an agent is liable under the doctrine of *respondeat superior* for the torts of subagents in which it did not participate when such subagents were appointed and paid by the principal and were engaged in the principal's business.

Statement.

The petitioner, a Virginia corporation, entered into a contract with the United States Maritime Commission whereby it agreed to act as its Managing Agent for certain vessels owned by the Maritime Commission, including among others the *S. S. Waukegan*. The *S. S. Waukegan* on January 10, 1939, while proceeding through the Chesapeake & Delaware Canal, collided with the bridge over said Canal at St. Georges, Delaware and as a result of that collision respondent's intestate was instantly killed. The District Court found that the collision was due to the negligence of the master or other officers of the *Waukegan*. This finding was affirmed by the Circuit Court of Appeals.

No negligence other than that of the officers and crew of the *Waukegan* was found by either Court below and no other negligence was claimed by the respondent.

The contract between the petitioner and the Maritime Commission makes it clear that the *Waukegan* was operated for the account of the Maritime Commission. The contract provides:

"3. *Allocation of Vessels.* The Owner hereby allocates the vessels above named to the Managing Agent for management and operation under this agreement. * * *

* * * * * *

"6. *Conduct of Business of the Line.* The vessels shall be used only for the carriage of lawful merchandise and passengers. All business shall be carried on in the name of the Line for the account of the Owner. The Managing Agent shall, as directed by the Owner, collect all monies and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents. The Managing Agent agrees to continue to book cargo for the vessels of the Line for voyages beyond the termination of this agreement, provided that all such commitments shall be subject to such instructions as may be issued by the Owner.

"7. *Managing Agent to Man, Supply and Operate.* The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied.

* * * * * *

> "19. *Payment of Overhead.* The Owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement. * * *"

In actual practice the master and officers were appointed by the Maritime Commission and were paid by the Maritime Commission. All the operating expenses were paid directly by the Maritime Commission. The petitioner received for its services only its actual overhead expenses. These facts were not disputed.

The Circuit Court of Appeals held that the officers and crew of the *Waukegan* were agents and employees of the Maritime Commission, but nevertheless held the petitioner liable for their negligence relying upon cases which hold an agent liable for his own torts or torts in which he participates. The Circuit Court of Appeals said:

> "* * * Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it cites an opinion* to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, it does not follow that appellant is exculpated. That a principal is liable for a wrong does not necessarily immunize his agent. *Blumenthal* v. *United States,* 30 Fed. (2d) 247, 248, 249 (C. C. A. 2, 1929); *Sloan Shipyards* v. *U. S. Fleet Corp.,* 258 U. S. 549,

* 34 Op. Att'y Gen'l. 363.

567-568 (1922). The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. It is irrelevant, here, whether, at common law or by statute, appellee has a cause of action against the United States or the Commission. or whether appellant may be liable to the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make appellant liable on the facts of this case. It had a most substantial measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line'. The reserved powers of the Owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the Owner did substitute itself as manager, either generally or at the time of this accident. Even if the Maritime Commission selected the officers, as appellant contends, appellant was not ousted of control. We think our opinion in *United States Shipping Board Emergency Fleet Corp.* v. *Greenwald,* 16 Fed. (2d) 948, which held a Managing Agent with similar powers liable for the death of a seaman, is applicable here, although in that case the Managing Agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons."

No claim was made in either Court that the petitioner was in any respect negligent or that it controlled or should have controlled the master either in the loading or in the navigating of the *Waukegan.*

Reasons for Granting the Petition.

The Circuit Court of Appeals has decided a question of the law of agency contrary to the decisions of this Court, contrary to an opinion of Attorney General Stone rendered in 1925 dealing with a similar situation, contrary to the universally established principles of the law of agency as set forth in treatises and decisions of the various courts. The decision affects the relationship between the Maritime Commission and all those operating vessels for its account at a time when that relationship is of the utmost importance. This decision will mean, if it remains unchallenged, that the managing agents are liable for all damages due to negligent navigation,—a liability they never contemplated and which was never before even considered in any reported decision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

SOUTHGATE NELSON CORPORATION,
Petitioner.

By ARTHUR M. BOAL,
Counsel for Petitioner.

I HEREBY CERTIFY that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Honorable Court; and that it is not filed for the purpose of delay.

ARTHUR M. BOAL,
Counsel for Petitioner.